80-1601

Office-Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CROATAN BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury forced to view allegedly obscene films three at a time can properly apply the test for obscenity and evaluate each film "as a whole?"

2. Whether a warrant which necessarily results in a prior restraint on the dissemination of material presumptively protected by the First Amendment because it authorizes seizure not only of films allegedly obscene, but also of projectors and other equipment necessary to carry on first amendment activities, is overbroad and constitutionally invalid.

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IN THE

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OCTOBER TERM, 1980

No.

CROATAN BOOKS, INC.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

OPINIONS DELIVERED BELOW

The judgment of the Circuit Court of Fairfax County appears in the appendix hereto. The order of the Virginia Supreme Court, dated January 21, 1981, declining to issue a writ of certiorari to the Circuit Court of Fairfax appears in the appendix hereto. In addition, the appendix includes relevant oral rulings of the General District Court of Fairfax County.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The first amendment to the United States Constitution, which provides in relevant part:

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[1] Caption lists all parties.

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The fourth amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner Croatan Books, Inc., is engaged in the sale and rental of sexually oriented films, books and magazines at a store located in Fairfax County, Virginia. On January 24 and March 8, 1979, petitioner's place of business was the subject of raids, pursuant to warrant, conducted by county Vice Squad officers. The warrants authorized the seizure of numerous short films from private projection booths, along with projectors and other projection equipment, coin boxes and advertising placards.

The raids unnecessarily caused such damage to Croatan's facilities as to prevent continued exhibition of other films or of copies of the seized films. Officers seized coin boxes by prying them off the walls with a crowbar. They seized projectors, screens and mirrors used for projection, and on the March 8 raid, they seized advertising placards by taking the projection booth doors to which they were affixed. The raids were conducted in a needlessly obtrusive manner: large numbers of officers, including police photographers, roamed through the premises; patrons were informed that they could enter or remain only if they presented identification.

At a suppression hearing in the General District Court of Fairfax County, Virginia, Croatan argued that all the evidence must be suppressed because the raids had

been conducted in violation of the first and fourth amendments. The General District Court declined to suppress the films but ordered the return of all property, save one projector, one coin box and one placard. Although refusing to suppress, the court strongly denounced the way in which the searches had been conducted, the size of the raiding parties, the solicitation of customer identification and the magnitude of the seizures. At a trial *de novo* in the Circuit Court of Fairfax County the suppression issue was reviewed on the basis of Croatan's legal memorandum and on the record of the suppression hearing before the General District Court. The Circuit Court denied Croatan's motion to suppress.

Prior to the trial *de novo* in the Circuit Court, Croatan requested that the 42 counts of renting obscene material be severed in order that a single jury be required to view no more than ten or fifteen films. Croatan believed that subjecting a jury to the overwhelming task of considering forty-two films shown each in its entirety would be so exhausting and irritating that the jury would be unable to give each a fair and conscientious viewing.[2] The court, however, proposed its own solution to the problem. The jury would be shown *three films simultaneously*, thereby reducing the viewing time by two-thirds. Croatan vigorously resisted this suggestion and renewed its request for severance, contending that the test for obscenity, requiring as it does that the work in question be "taken as a whole," could not properly be applied by a jury forced to consider films three at a time. The court still refused to permit severance. After Croatan entered pleas of guilty as to ten of the films, the remaining thirty-two were shown on a courtroom wall utilizing three projectors running simultaneously. The jury ultimately returned verdicts of guilty as to twenty of the thirty-two films.

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[2] The viewing in the first trial in the General District Court had taken nearly eight hours.

REASONS FOR ALLOWING THE WRIT

I. A Jury Forced to View Three Films at a Time Cannot Evaluate Each Film in Conformity with the Constitutional Test for Obscenity

The sole contested issue at trial was whether the seized films appealed to a "prurient interest" in sex. Croatan introduced the extensive expert testimony of Dr. Lawrence Donner, a psychologist specializing in the study of sexual behavior and associate professor of clinical psychology at the University of Maryland School of Medicine. Dr. Donner testified that in his opinion none of the films appealed to a "prurient," i.e., a sick, morbid or shameful interest in sex, but rather appealed to a normal and healthy erotic interest in sex. The State countered with the testimony of lay witnesses from the community.

In determining whether the dominant theme or purpose of a film is an appeal to the prurient interest, a jury must consider the film as a whole and not base its judgment on isolated portions or scenes. *Miller* v. *California*, 413 U.S. 15, 24 (1973). In the landmark case of *Roth* v. *United States*, 354 U.S. 476, 489 (1957), this Court disposed of the notion that obscenity can be judged on the basis of isolated excerpts and held that the determination of obscenity must proceed from a consideration of the material "taken as a whole." The current standard for obscenity, the so-called "*Miller* test," examines

> (a) whether "the average person, applying contemporary community standards" would find that the work, *taken as a whole*, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (emphasis added).

An isolated segment of a film, book or magazine cannot constitutionally provide either probable cause for an obscenity arrest[3] or the foundation for an obscenity conviction.[4] When the obscenity of a motion picture is in issue, the factfinder must view the entire film in order to make a proper determination.[5] Failure to do so must vitiate the finding of obscenity.[6]

In this case, Croatan focused its entire argument upon the first prong of the *Miller* test, seeking to establish in

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[3] *See United States* v. *Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977); *Hosey* v. *City of Jackson*, 309 F. Supp. 527, 534 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971); *Cambist Films, Inc.* v. *Duggan*, 298 F. Supp. 1148, 1152 (W.D. Pa.), *rev'd on other grounds*, 420 F.2d 687 (3d Cir. 1969); *Hanley* v. *State*, 479 P.2d 486, 493 (Alaska 1970).

[4] *See, e.g., Playboy Publications, Inc.* v. *McAuliffe*, 610 F.2d 1354, 1369 (5th Cir.), *cert. dismissed*, —— U.S. ——, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980) (while certain parts of a magazine if considered separately would be obscene, the magazine may turn out to be not obscene when considered as a whole); *In re Louisiana News Co.*, 187 F. Supp. 241, 246 (E.D. La. 1960) (one objectionable picture cannot render entire publication obscene); *People* v. *New Horizons, Inc.*, —— Colo. ——, 616 P.2d 106 (Colo. 1980) (statute unconstitutional which would allow magazine consisting of words and pictures to be declared obscene on the basis of the pictures alone without reference to text or accompanying articles).

[5] *See Haldeman* v. *United States*, 340 F.2d 59, 62 (10th Cir. 1965); *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (7th Cir. 1961); *United States* v. *West Coast News Co.*, 228 F. Supp. 171, 178 (W.D. Mich. 1964), *aff'd*, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub nom. Aday* v. *United States*, 388 U.S. 447 (1967); *Bourland* v. *State*, 502 S.W.2d 8, 9 (Tex. Crim. App. 1973); *Bryers* v. *State*, 480 S.W. 2d 712, 717-19 (Tex. Crim. App. 1972); *McKinney* v. *Tuscaloosa*, 268 So. 2d 488, 492 (Ala. 1972).

[6] For example, in *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (9th Cir. 1961), the court overturned an obscenity conviction where the factfinder "failed to view the film as a whole and thus could under no circumstances apply the proper standard of obscenity."

the minds of the jury a distinction between material which appeals to a "prurient" interest in sex and that which appeals merely to the perfectly normal, healthy erotic interest in sex. That is a distinction subtle enough to challenge a jury's discrimination even in the best of circumstances. It is too much to expect that any jury confronted with *three films* projected *simultaneously* upon the courtroom wall can somehow perceive each "as a whole," fix each in mind and memory, and then accurately sort through the afternoon's jumble of cinematic impressions in order to separate the obscene from the protected.

The simultaneous screening forced the jurors to turn from film to film, able to concentrate on only a portion of each at a time or perhaps, when attention waned, to let vision fall passively upon some one of the three. Whatever the case, it is plain that no juror could have viewed all of every film, and therefore none could judge each film as a whole.

In light of *Roth* and *Miller*, there is simply no alternative to viewing each film in its entirety and judging each as an integral whole. The procedure adopted here undermines a basic tenet of first amendment jurisprudence namely: that a work is obscene, if at all, by virtue of its entire content, not by virtue of some particular, isolated part. To permit, as here, a trial court to impose a procedure which precludes any possibility that disputed films can be judged in their entirety would be, in practical effect, to sanction a return to the days of *Regina* v. *Hicklin*, L.R. 3, Q.B. 360 (1868), when it was thought proper to judge obscenity by viewing only isolated excerpts of a work. To protect the vitality of the *Roth-Miller* approach and to assure that trial courts exercise utmost vigilance in assuring that trial procedures do not undermine the most basic principle of those seminal cases, the requested writ should issue.

II. A Search Warrant Which Affronts the First Amendment by Creating an Unlawful Prior Restraint is Overbroad and Must be Remedied by Suppression of All the Fruits of the Search and Seizure

The warrants in this case provided for the seizure not only of particular items alleged to be obscene, but also for the seizure of non-criminal viewing equipment. The January warrant authorized the seizure of fifteen projectors, fifteen coin boxes and various advertising placards, in addition to twenty films. Similarly, the March warrant permitted the seizure of thirty coin boxes, ten screens and ten mirrors used in projection. The removal of these items of equipment caused considerable damage to the premises, and during one of the raids police officers were obliged to take projector booth doors in order to seize advertising placards affixed to them.

By authorizing the seizure of viewing equipment, the warrants condoned an unlawful prior restraint.[7] The taking of the equipment interfered with Croatan's ability to continue disseminating presumptively protected material. The warrants fail because they go beyond the power to seize allegedly obscene material and purport to empower the authorities "to seize the instrumentalities so that they cannot be used to disseminate *any* speech at all." *United States* v. *Polak*, 312 F. Supp. 112, 116 (E.D. Pa. 1970). As one court has put it, the state has no more right to seize the projector because the film is objectionable than it would have "to seize the printing

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[7] *See Eagle Books, Inc.* v. *Reinhard*, 418 F. Supp. 345 (N.D. Ill. 1976), *vacated on other grounds*, 432 U.S. 902 (1977); *Cinema Classics, Ltd.* v. *Busch*, 339 F. Supp. 43 (C.D. Cal.); *aff'd*, 409 U.S. 807 (1972); *Maguin* v. *Miller*, 433 F. Supp. 223, 230 (D. Kan. 1977); *Universal Amusement Co., Inc.* v. *Vance (Ellwest Stereo Theatre, Inc.* v. *Byrd)*, 404 F. Supp. 33, 51-57 (S.D. Tex. 1975); *United States* v. *Polak*, 312 F. Supp. 112 (E.D. Pa. 1970); *Europo Books, Inc.* v. *Pomerleau*, 41 Md. App. 114, 395 A.2d 1195 (Md. Ct. Spec. App. 1979).

presses because the newspaper contains patently obscene matter." [8] *Europo Books, Inc.* v. *Pomerleau*, 41 Md. App. 114, 395 A.2d 1195 (Md. Ct. Spec. App. 1979).

In cases where there has been a seizure of the instruments needed for distribution of presumptively protected material, the government typically argues that they were seized as evidence and instrumentalities of the crime. Such an argument must fail; [9] the evidentiary value of projectors, for example, at an obscenity trial is minimal at best, but the effectiveness of such a seizure in restricting expression is substantial: [10]

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[8] The court in *Polak*, 312 F. Supp. at 116, stated the issue even more emphatically. The government had sought to justify seizure of a mail order house's copiers and business machines. It argued that the machines were instrumentalities of the crime of using the mails to distribute obscene matter. The court gave the argument short shrift:

> If the Government's argument on this point is accepted, they would be permitted to seize and retain the printing presses of a large metropolitan newspaper if a single commercial advertisement were determined to be obscene. The next step would be to seize a television network on the ground, perhaps, that its instrumentalities were used in the dissemination of an obscene film. The scope of the power asserted is almost limitless. To permit the Government by this device to seize the very instrumentalities of speech would effect a much more drastic suppression of the opportunities of expression than any of the prior restraints which have been heretofore considered and condemned by the United States Supreme Court.

[9] Cases which have considered and rejected such an argument include *Universal Amusement Co., Inc.* v. *Vance (Ellwest Stereo Theatre, Inc.* v. *Byrd)*, 404 F. Supp. 33, 51-57 (S.D. Tex. 1975); *United States* v. *Polak*, 312 F. Supp. 112 (E.D. Pa. 1970); *Bongiovanni* v. *Hogan*, 309 F. Supp. 1364 (S.D.N.Y. 1970); *Europo Books, Inc.* v. *Pomerleau*, 41 Md. App. 114, 118, 395 A.2d 1195, 1198 (Md. Ct. Spec. App. 1979); *Porno, Inc.* v. *Municipal Court*, 33 Cal. App. 3d 122, 108 Cal. Rptr. 797 (Cal. Ct. App. 1973).

[10] As was said in *Europo Books*, 41 Md. App. at 1198, 395 A.2d at 118:

> The State claims . . . that all it was attempting to do was to gather evidence for the trial of obscenity cases and the instruments used in the business were evidence of the crime. Certainly, projection equipment, coin boxes, stools, and portions of booths would not be relevant evidence in the trial of a case alleging commercial exhibition of obscene materials. Proof of the obscenity would seem to rise or fall with the material exhibited, not with equipment used to exhibit the materials. . . .
>
> In a case which does not involve the first amendment, this court might accept the "evidence" argument . . . . It is too tenuous, however, when placed in the light of the first amendment. . . . Whether intentional or not, and we need not make such a finding here, [the seizures] served to curtail the operation of the business.

Universal Amusement (*Ellwest*), 404 F. Supp. at 54-55.

Seizures of the sort encountered here make it physically and financially unfeasible for exhibitors to carry on with their business. It is precisely because of their impact upon the free dissemination of presumptively protected materials that they must be condemned as prior restraints.

> Motion pictures are protected by the first amendment. Only if they are judicially judged to be obscene, using the guidelines set forth by the Supreme Court, do they cease to be protected by the first

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The theory advanced by the State for the seizure of the projectors is that they are "evidence of the crime" of showing unlicensed motion picture film. Why the film, itself, coupled with the testimony of the officer that it had been exhibited, would not suffice is unexplained. Neither is there an explanation as to how the projector adds to the State's proof or in any manner strengthens the State's case.

We believe the State had no more right to seize the projector . . . than it would . . . to seize the printing presses because the newspaper contains patently obscene matter.

> amendment. While it is true that the showing of a motion picture can be a crime, it is not a crime until it has been judicially determined to be so. This fact takes motion picture obscenity cases out of the realm of crimes such as gambling. A gambler may have a business and he may utilize gambling machines and instruments to carry on his business. The police . . . may come in with a search warrant and seize all of his equipment, effectively shutting down his business. Such a case would not disturb a court for one reason: the gambler does not have any protections which fall outside the due process requirements of a state's criminal laws. The adult motion picture proprietor, however, . . . has an added protection—the protection of the first amendment. Until the items which he shows are each proved obscene, he can show anything he wants to show. The police cannot shut down or attempt to shut down his business.

Universal Amusement (Ellwest), 404 F. Supp. at 54.

The scope, purpose and method of searches and seizures of material presumptively protected by the First Amendment must be analyzed with special rigor. *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961). In particular, seizure of specific films for the bona fide purpose of obtaining evidence for a criminal proceeding must be distinguished from a seizure which is aimed at, or has the effect of, actually blocking the continued distribution or exhibition of presumptively protected matter which has not yet been subject to a judicial determination of obscenity. *Heller* v. *New York*, 413 U.S. 483, 492 (1973). A seizure of the latter type is an impermissible prior restraint. *Marcus*, 367 U.S. at 736. The scope of the warrant, as well as the procedures utilized in executing it, must be structured so as to ensure that the distribution of protected material is not stifled.

If a warrant, when executed in accordance with its terms, naturally and necessarily creates a prior restraint,

then that warrant fails for overbreadth and is unconstitutional on its face. When a seizure is made pursuant to a warrant which is overbroad, the appropriate remedy is suppression of all the property seized. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980); *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *Burch*, 432 F. Supp. 961 (D. Del. 1977), *aff'd mem.*, 577 F.2d 729 (1978).[11]

The long-standing American aversion to prior restraints became a keystone of first amendment theory with the Supreme Court's decision in *Near* v. *Minnesota*, 238 U.S. 697 (1931). No matter what form they take, prior restraints are utterly inimical to first amendment values. In the instant case, needlessly overbroad warrants created a prior restraint. To remedy that first

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[11] The cases cited deal with "general warrants." The purpose of the fourth amendment particularity requirement is to prevent the seizure of unoffending or irrelevant items. In one sense, the problem posed by the warrants at issue in this case is comparable to the general warrant situation: the projection equipment seized was (1) "unoffending" since there is no criminality attached to possession of such equipment, and (2) "irrelevant" since, as explained in the text accompanying notes 9-10, the equipment would be of little evidentiary value in prosecuting an obscenity violation.

However, the problem here lies beyond the resolving power of these purely fourth amendment categories. Even if the warrants appeared to be valid in terms of the fourth amendment particularity requirement, it would nonetheless be true that their execution would result in an impermissible prior restraint. The first amendment prior restraint problem, it is submitted, constitutes independent and sufficient grounds for holding the warrants invalid. *Lo-Ji Sales*, it should be noted, also involved the seizure of projection equipment, but since the warrant there was so far short of traditional fourth amendment standards, the case could be resolved on the basis of a straightforward fourth amendment analysis. Thus, *Lo-Ji* gave this Court no occasion to explore the interface between first and fourth amendment principles.

amendment injury and to deter similar violations in the future, the fruits of the searches and seizures authorized by those warrants should have been suppressed. The writ which petitioner seeks should therefor issue.

Respectfully submitted,

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APPENDIX

APPENDIX

CONTENTS OF APPENDIX AND EXPLANATORY NOTE

As an aid to the Court, the contents of this Appendix are set forth and explained as follows:

1. Order of the Supreme Court of Virginia Denying Writ of Certiorari to the Circuit Court of Fairfax County, January 21, 1981 ..... 2a

2. Order Denying Defendant's Motion to Suppress and Judgment of the Circuit Court of Fairfax County, May 22, 1980 * 3a

3. Relevant portions of the oral rulings of the General District Court of Fairfax County concerning the suppression issue and denying defendant's motion to suppress, Transcript, December 17, 1979, pp. 74-77, (Conrad Waters, J.) 4a-5a

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* So as to conserve space, this appendix contains the order and judgment pertaining to *one* of the twenty films adjudged obscene. The order and judgment reproduced is representative of, and except for the case number notation and amount of the fine specified, identical to each of the nineteen others rendered by the Circuit Court on May 22, 1980.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 21st day of January, 1981.

Record No. 801322

Circuit Court Nos. 31295 through 31301, 31304, 31309 through 31311, 31314, 31317, 31319, 31321 through 31324, 31329 and 31330

CROATAN BOOKS, INC.,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

ALLEN L. LUCY
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

#31295

COMMONWEALTH OF VIRGINIA

vs.

CROATAN BOOKS, INC.

Appeal—Possession of an obscene film
with intent to rent

This 22nd day of May, 1980, came the Commonwealth, by her Attorney, and the Defendant, CROATAN BOOKS, INC., by its Counsel, Roger Zuckerman.

Thereupon, the Court Reporter was sworn.

Whereupon, the Court heard further argument on Counsel for the Defendant's motion to suppress, which motion the Court denied.

This case having come on this day for imposition of sentence, it is therefore, ADJUDGED and ORDERED that the Defendant pay a fine of $1,000.00 and the costs of this case.

Whereupon, Counsel for the defendant made a motion to suspend payment of said fine pending an appeal, which motion the Court denied.

/s/ [Illegible]
Judge

A Copy Teste:

JAMES E. HOOFNAGLE
Clerk

[SEAL]

By: /s/ Jessie M. Clarke
Deputy Clerk

RELEVANT PORTIONS OF THE ORAL RULINGS OF THE GENERAL DISTRICT COURT OF FAIRFAX COUNTY CONCERNING THE SUPPRESSION ISSUE AND DENYING DEFENDANT'S MOTION TO SUPPRESS, TRANSCRIPT, DECEMBER 17, 1979, pp. 74-77

(Conrad Waters, J.)

First of all, I find it was not a general warrant. The warrant itself, I find it was properly executed, both warrants. . . .

* * * *

. . . I'm denying all your grounds for suppressing the evidence seized, but I want to know whether those films can be taken off one projector and put on another, and, if so, my order is that all projectors but one, all coin boxes but one, be returned. No films.

The placards and doors, if pictures can be taken, it's far better or of equal weight in my opinion to have the pictures and testimony going with those pictures than to have doors, or, in any event, keep one door with one placard, but I'm sure the testimony can go to the others hopefully, depending on what your case is like, your testimony could do the rest.

I think that the volume coming out of these places to the point that I think it comes close to one of these cases where it's shutting down the business, and there's no outstanding order of a court that I know of to shut down their business; when that happens, then that's what you do if you're executing that order.

So my ruling is that I deny the motion to suppress with the comments that I've made in the future, both as to the warrants, as to the people, as to where they go.

I will grant the motion to return if it can be shown to me, and I would expect that somebody could do that, to-

day or whenever, that that film, continuous film, can be threaded into one spool, put in another, and, at that time, and I want every—you've got numbers of them, if you get numbers, brand names, photos, fine; then I think let's return the projectors and the doors and mirrors and things like that that you have photographic evidence now, and I think with testimony that that will be sufficient.